

# **EXHIBIT D**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Securities Exchange )  
Commission, ) Civil Action  
 ) No. 23-cv-1599  
Plaintiff, )  
 ) Hearing for Temporary  
vs. ) Restraining Order  
 )  
Binance Holdings Limited, ) Washington, DC  
et al., ) June 13, 2023  
 ) Time: 2:00 p.m.  
Defendants. )

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TRANSCRIPT OF HEARING FOR TEMPORARY RESTRAINING ORDER  
HELD BEFORE  
THE HONORABLE JUDGE AMY BERMAN JACKSON  
UNITED STATES DISTRICT JUDGE

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1 THE COURT: All right. And --

2 MR. SCARLATO: Go ahead.

3 THE COURT: When you use the formulation crypto asset  
4 versus crypto asset securities, can you tell me, what are the  
5 differentiating factors?

6 MR. SCARLATO: Whether they meet the *Howey* test.

7 THE COURT: That's it? The *Howey* test for each  
8 one --

9 MR. SCARLATO: Yes.

10 THE COURT: -- in --

11 MR. SCARLATO: I'm sorry, Your Honor. Yes, that's  
12 how a security is defined, and we give 14 specific  
13 representatives. We're not saying that's exclusive, Your  
14 Honor. Our complaint, we feel like, was long enough, so we  
15 gave a bunch that we thought satisfied that test and reserve  
16 our right in discovery to, you know, conform our complaint to  
17 the pleadings or whatever is necessary before trial.

18 THE COURT: All right. Are the other crypto assets  
19 that you're not labeling as securities, commodities?

20 MR. SCARLATO: The other -- that aren't alleged in  
21 our complaint, Your Honor?

22 THE COURT: The others that you say they're trading  
23 in that you're not saying are securities, because you're not  
24 saying all of the ones they're trading in are securities,  
25 correct?

1 MR. SCARLATO: We -- at this time, Your Honor, we're  
2 reserving our rights, just given we're at the pleading stage we  
3 have to get into discovery where we can make a full assessment.  
4 But our position, Your Honor, is that if one of these coins are  
5 a security, we've won.

6 THE COURT: I heard that.

7 MR. SCARLATO: Okay.

8 THE COURT: But you have said all over the complaint  
9 crypto assets -- and you differentiate that specifically from  
10 crypto asset securities, and you make it clear that one  
11 category is larger than the other category and that both  
12 categories are on the Binance.com platform and the Binance.US  
13 platform, correct?

14 MR. SCARLATO: Yes.

15 THE COURT: So I'm asking you, the ones that you are  
16 not putting in the securities category, what are they? Are  
17 they commodities?

18 MR. SCARLATO: We are not -- thank you, Your Honor.  
19 We are not taking a position at this time. We're at the  
20 pleading stage. We are trying to get past, you know, any  
21 potential motion to dismiss and satisfying our burden under the  
22 rules. So we have, we think, way more than is required under  
23 Rule 8. We gave the Court and the parties notice as to -- I  
24 think the number is 14 total coins, including BNB, which is at  
25 issue in the TRO.

1           THE COURT: All right. If the Binance coin is the  
2           only security that you're relying on right now for purposes of  
3           the TRO and the facts that you rely upon when you describe to  
4           me why it meets the test are from the time of the initial  
5           offering, how does that -- how does that make it a security  
6           now, such that BAM Trading, which was created later, didn't  
7           even exist at the time of the ICO, how does it make it a dealer  
8           in these securities?

9           MR. SCARLATO: And, Your Honor, I want to see if my  
10          colleague wants to -- do you mind if I defer to my colleague,  
11          Mr. Murphy, on this?

12          THE COURT: No. Go ahead. I don't want two of you  
13          answering the same question, but two of you can answer  
14          different questions.

15          MR. MURPHY: So, sorry, Your Honor, let me just  
16          restate -- oh, Emmett Murphy, from the SEC.

17          So let me just restate, so I understand. The  
18          question is, why is -- why are facts back from 2017 relevant to  
19          whether BNB is a security when BAM Trading as a platform hadn't  
20          opened by 2017?

21          THE COURT: Yes. There's an argument made in their  
22          opposition that when you describe it as a security, the facts  
23          you're relying upon are the fact that it was offered at the  
24          time when they were saying we're going to use these funds to  
25          set up this platform, et cetera, et cetera, and you talk about

1 the enterprises being created and you -- all your facts relate  
2 to the 2017 offering. And they have pointed out that they  
3 didn't exist at the time of the offering and now these coins  
4 have been around since then. So, how does it make it a  
5 security? Why is it still a security now?

6 MR. MURPHY: Yeah, Your Honor, so I was reading that  
7 last night and I was confused because I thought at one point  
8 they were making an argument about statute of limitations for a  
9 Section 5 offering under the Securities Act, which they can  
10 raise as a defense. I don't think that undermines our prima  
11 facie case. But if the question is: Why is it a security?  
12 *Howey* looks at the economic substance of the instrument at  
13 issue.

14 And here, those statements back in 2017 are  
15 unfiltered statements about what the economic reality is of  
16 these crypto assets. They were absolutely candid that these  
17 were investments where they were seeking money for investors to  
18 grow the enterprise. If their argument is that it somehow is  
19 no longer an investment contract because -- and they have a  
20 bunch of different things in their papers -- because it's  
21 become adequately decentralized or somehow has changed its  
22 nature --

23 THE COURT: I guess the point is, when you did the  
24 offering, people could buy them. And since then they've been  
25 on the platforms and people could trade them, sell them,

1 repurchase them. At that point the people aren't responding to  
2 the initial offering, they're responding to that asset. I want  
3 one of those, I don't want one of those. So at that point, why  
4 is it a security, as opposed to, like, another coin?

5 MR. MURPHY: I guess I would just say that there are  
6 secondary trading markets for all kinds of securities. And if  
7 the idea that once it goes into the secondary trading market it  
8 doesn't become a security, that would destroy all kinds of  
9 understandings of how the securities markets work. The  
10 statements that they made, again, go to the raw economic  
11 reality of these people buy them so that their value will be  
12 appreciated.

13 The Binance enterprise -- and you know in our papers  
14 that we don't think there's such a clear distinction between  
15 .com and BAM and the platforms. Right? Binance is running  
16 both. But they're clear in statement after statement that we  
17 set out in our papers that this is an ongoing enterprise, there  
18 are ties to the BNB, their prestige is tied to the BNB, they  
19 will support the price; you will make money if you buy BNB.  
20 And that is continuous from that ICO to the present day.

21 THE COURT: Isn't that the flip side of what you say  
22 a security is? You're saying that they're saying it's tied to  
23 them, as opposed to they're tied -- the success of the coin is  
24 based on the success of the platform, and you just turned that  
25 the other way, I think.



1 MR. MURPHY: I don't know, Your Honor. I think  
2 they've tied their fate to BNB in many ways, which goes to the  
3 commonality element of *Howey*, where folks are looking at the  
4 efforts of others. And the question might be, there's  
5 statements in their papers to the effect of Binance has nothing  
6 to do with BNB anymore, BNB is a baby that's been born and we  
7 have nothing to do with it and it will be fine without Binance.  
8 And I think the facts that we put into our papers are very  
9 clear that that's not the case, that they've -- on their web  
10 page and their blog, they are constantly monitoring the price,  
11 talking about how it's a valuable asset, giving you additional  
12 uses for the asset, and making clear to the investing public  
13 that they are invested in it, they are going to continue to  
14 create ways to make money on BNB.

15 THE COURT: All right. What is your response to the  
16 argument that the coin can't be a security contract for  
17 purposes of the *Howey* case if there's no contract?

18 MR. MURPHY: I would respond by pointing to the  
19 language in *Howey* itself which says, essentially, that  
20 investment contract was meant to be a catchall term for all the  
21 different ways that people solicit capital to get other  
22 people's money on the promise of profits. And the language in  
23 *Howey* -- if I could just look, so I don't -- *Howey* says that an  
24 investment contract can cover schemes or contracts. And I  
25 think that language is clear. And if you look at -- this is

1 on, sorry, 298 and -99 in *Howey*.

2 *Howey* defined the investment contract as a contract  
3 transaction or scheme. If you look at the *Telegram* case that  
4 we cited in our papers, there you had initial purchasers who  
5 had contracts and the later public where it was distributed  
6 very quickly. And the Court looked through the economic  
7 substance of that, where there had clearly been an attempt made  
8 to insulate themselves from the securities laws by saying we  
9 had these initial sophisticated purchasers, they're exempt from  
10 the securities laws, they're very sophisticated, and whatever  
11 happens after that we have no control of.

12 The Court in *Telegram* looked through that and said,  
13 no, it's all part of the same offering. You are selling to a  
14 broader public, that's the only reason it has its value. There  
15 was no contract with that broader public and yet the Court  
16 still found a Section 5 offering there.

17 THE COURT: Okay. I want to talk about the  
18 misrepresentations, which is section 6 of your statement of  
19 facts. I don't know if that's your issue.

20 MR. MURPHY: We're going to tag team, if you'd allow.

21 THE COURT: All right.

22 MR. MURPHY: Sorry, I don't want to walk off with  
23 Mr. Scarlato's papers here.

24 THE COURT: All right. That section alleges  
25 misrepresentations by the U.S. BAM entities regarding trade